



Town of Southern Shores

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Planning Board Meeting

July 16, 2018

5:30 p.m., Pitts Center

MEETING MINUTES

I. CALL TO ORDER:

Deputy Town Manager / Planning Director Wes Haskett called the meeting to order at 5:30 pm. Planning Board Members Glenn Wyder, Elizabeth Morey, Andy Ward, David Neal, Alternate Member Michael Basilone, Planning Board Attorney Jay Wheless, Town Attorney Ben Gallop, and Town Clerk Sheila Kane were present. Alternate Member Michael Basilone participated as a voting member due to the absence of Regular Member Joe McGraw.

II. PLEDGE OF ALLEGIANCE:

Wes Haskett led the Pledge of Allegiance.

III. APPROVAL OF AGENDA:

Glenn Wyder motioned to approve the agenda. Elizabeth Morey seconded the motion. The motion passed unanimously (5-0).

IV. APPROVAL OF MINUTES:

Glenn Wyder motioned to approve the minutes of the March 19, 2018 Planning Board Meeting as presented. David Neal seconded the motion. The motion passed unanimously.

David Neal motioned to approve the minutes of the May 21, 2018 Planning Board Meeting as presented. Glenn Wyder seconded the motion. The motion passed unanimously.

V. PUBLIC COMMENT:

None

VI. OLD BUSINESS:

None

VII. NEW BUSINESS:

A. Election of Officers

Wes Haskett indicated that it was time to elect new Planning Board officers. He then asked for nominations for Chairperson. Andy Ward nominated Glenn Wyder to serve as Chairperson. David Neal seconded the nomination. The nomination passed unanimously.

Wes Haskett asked for nominations for Vice Chairperson. David Neal nominated Elizabeth Morey for Vice Chairperson. Andy Ward seconded the nomination. The nomination passed unanimously.

B. VA-18-05 VARIANCE REQUEST SUBMITTED BY MR. E. CROUSE GRAY, JR. ON BEHALF OF THE HOMEOWNER, MR. EDWARD J. RYAN OF 291 DUCK RD FOR A VARIANCE FROM SECTION 36-202, (d), (4) AND (5) OF THE SOUTHERN SHORES TOWN CODE

Variance requests are heard by the Board of Adjustment. Chairperson Wyder indicated that the Planning Board was now acting as the Board of Adjustment.

Chairperson Wyder explained the quasi-judicial public hearing procedure and rules and stated all witnesses wishing to give testimony will need to be sworn in by the Clerk. He then reviewed several areas of possible conflicts of interest and asked the Planning Board members if they had any conflicts of interest. Hearing no conflicts, Chairperson Wyder proceeded.

Chairperson Wyder read the standards for granting variances from the ordinance which is based on North Carolina General Statutes. Section 36-397 of the Town Zoning Ordinance establishes that the Planning Board, when performing the duties of the Town Board of Adjustment, shall vary any of the provisions of the Zoning Ordinance upon a showing of all the following:

1. Unnecessary hardship would result from the strict application of the ordinance.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography.
3. The hardship did not result from actions taken by the applicant or the property owner.
4. The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

SWEARING IN OF ALL PEOPLE GIVING TESTIMONY

All parties wishing to give testimony during the public hearing were sworn in by the Clerk.

HEARING TO DETERMINE LEGAL STANDING OF JACQUELINE SHEA OF 290 WAX MYRTLE TRAIL, SOUTHERN SHORES

Ms. Shea, represented by her attorney Mr. Lee Malco was questioned by Board members and Board Attorney Jay Wheless to determine what factors qualified her to have legal standing. The board voted 5-0 to grant standing.

OPEN HEARING & EVIDENTIARY PORTION OF HEARING

Chairperson Wyder opened the public hearing and called on Wes Haskett to present the Staff Report (attached) and stated all applicable regulations of the Town Zoning Ordinance and all of Town Staff's concerns that are applicable to this application have been identified. The applicant is requesting a variance to allow a previously constructed deck, with a hot tub and swimming pool, that encroaches the applicable 15 ft. side yard

and 25 ft. rear yard setback requirements to remain as is in its current location. The unauthorized deck was discovered when the Town Building Inspector conducted an HVAC inspection on the subject property. Following inspection of the file, Town Staff determined that no permits were obtained for the unauthorized deck and no inspections had been conducted.

Section 36-57 defines "Yard" (setback) as a required open space, other than a court, unoccupied and unobstructed by any structure or portion of a structure, from 30 inches above the ground level of the graded lot upward, provided, however, that fences, walls, poles, posts, ocean dune platforms, walks, accessible ramps, steps and other customary yard accessories, ornaments, and furniture may be permitted in any yard subject to height limitations and requirements limiting obstruction of visibility or any other requirements of the Chapter. Based on this definition, the unauthorized deck constitutes a Zoning Violation which is in violation of Section 36-202, (d), (4) and (5) of the Town Zoning Ordinance.

Section 36-367 of the Town Zoning Ordinance establishes that the Planning Board, when performing the duties of the Town Board of Adjustment, shall vary any of the provisions of the Zoning Ordinance upon a showing of all of the following:

- (1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
 - Staff Comments: Strict application of the ordinance would result in removal of the deck or the encroaching portions of the deck. The property owner's loss would be the costs incurred from removal of the deck, or encroaching portions of the deck, and possibly the swimming pool and/or hot tub. The required abatement of a violation does not rise to an unnecessary hardship.
- (2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
 - Staff Comments: There is nothing peculiar about this property which gives rise to a hardship. It's location, size, shape and topology are similar to many lots within the Town.
- (3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
 - Staff Comments: The unauthorized deck was constructed without a Building Permit or Zoning Permit. If an application for the deck had been submitted, the permits would have been denied due to noncompliance with Section 36-202, (d), (4) and (5).
- (4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
 - Staff Comments: The intent of Section 36-202 which establishes the applicable side and rear setback requirements is to provide for the low-density development of single-family detached dwellings in an environment which preserves sand dunes, coastal forests, wetlands, and other unique natural features of the coastal area. The district is intended to promote stable, permanent neighborhoods characterized by low vehicular traffic flows, abundant open space, and low impact

of development on the natural environment and adjacent land uses. Public safety and substantial justice cannot be served by allowing someone to maintain an uninspected, unpermitted, and unlawful deck with a hot tub and swimming pool. To do so would be contrary to the ordinances, laws, rules and regulations which were violated by the property owner and would allow the property owner to disregard regulations that others must abide by.

Chairperson Wyder called on the Board for questions. Elizabeth Morey asked when you look at the file, is the original two-story dwelling within the setback. Mr. Haskett stated to the best of his knowledge the file only contains one survey and that the dwelling appears to be within the 25 ft setback.

Andy Ward stated that Building Inspector Buddy Shelton was at the residence on November 14, 2017 to inspect the HVAC. Mr. Haskett stated the Town Building Inspector was there to conduct a previously permitted HVAC system change out inspection on the subject property.

Chairperson Wyder asked if a permit was obtained for the pool. Wes Haskett replied that no permit was issued for the pool, deck, or hot tub. Chairperson Wyder further asked if the deck was less than 30 inches above the ground would it be in compliance. Mr. Haskett replied that the ordinance states that anything less than 30 inches (about 2 ½ ft.) may encroach, subject to height limitations.

Andy Ward inquired as to the height of the deck. Mr. Haskett replied that the engineered drawings (dated 4/20/18) that have been provided reference 3-4 ft with additional height.

Chairperson Wyder stated that the engineered drawings are from 4/20/18 but according to the tax records in 2016, an above ground pool was built and a wood deck. Mr. Haskett replied that the title on the engineered plans say "retrofit plan".

Andy Ward, in revisiting Chairperson Wyder's question about the 30 inches, asked if everything on the survey (dated 12/29/17) would be in compliance. Mr. Haskett stated decks have been allowed to go within a setback if less than 30 inches; to encroach setbacks based on the definition of a yard. However, hot tubs have never been considered-only decks and uncovered porches. He further stated that he would say the hot tub is a violation (because it is not a deck and because of the height.) The pool, as it is shown, would comply.

Andy Ward asked if the Town had issued a notice of violation. Mr. Haskett stated the violation was verbally expressed to the homeowner and Mr. Ryan informed Town Staff that he was willing to work with the Town and the Dare County Health Department. He requested to apply for a variance.

Wes Haskett reviewed the procedure with the Board if a variance is not granted. A Warning Citation would first be issued which must allow a minimum of 15 days for the violation to be abated. Abatement would include removal of the encroaching portions of the deck or the entire deck. He stated that Town Staff would be willing to accept the remaining portions of the encroaching deck as it sits today. Once abatement has taken place, Mr. Ryan can then apply for the necessary required building permit, zoning permit, and Dare County septic permit (all subject for review).

Wes Haskett stated that there is no septic system shown on the current survey in reply to Chairperson Wyder's inquiry.

Applicant Attorney Crouse Gray asked Mr. Haskett if the fence that is surrounding the pool adjacent to the pool decking itself is required and how thick is that decking requirement. Mr. Haskett replied that according to the survey, it is labeled as a fence and goes around the pool. He further stated that the State Building Code requires barriers around a swimming pool. He did not know the width of the decking required.

Ms. Shea's attorney, Mr. Lee Malco, asked Mr. Haskett if the decking was thirty inches in height, and still encroaching the setback, would Mr. Ryan still be required to obtain a permit and was a permit ever obtained. Mr. Haskett stated a building and zoning permit would still be required and to his knowledge, a permit was never obtained for the deck, pool, or hot tub.

Attorney Malco stated that according to the staff report any hardship here was created by the homeowner. Mr. Haskett replied if the homeowner would have submitted an application, it would have been denied if it was proposed as is; assuming that the deck is greater than 30 inches in height. The hot tub would still be a violation.

Chairperson Wyder asked that the staff report be entered into the evidentiary record and called on the applicant's presentation.

Attorney Gray asked Mr. Ryan if the current dwelling as pictured on the survey was there at the time of purchase. Mr. Ryan stated that the house was built in 1987 and he purchased the property with the current structure as seen on the survey. The rear encroachment was already existing at the time of purchase.

Attorney Gray asked the applicant some basic information in reference to the variance request. Mr. Ryan stated his property is located at 291 Duck Rd. and was purchased in October of 2015, approximately. He acknowledged he did not obtain any permits and went on to say that the hot tub is inflatable and the pool is above ground. He did not think permits were required for these, but didn't ask, and as far as the deck, he didn't think anyone would care.

Attorney Gray asked Mr. Ryan about the current location of the septic system and to elaborate on the plastic structure described in the survey. Mr. Ryan stated that the septic system is located under the front portion of the deck. He has been informed by the Dare County Health Department that the septic system will be required to be moved if he is to keep the deck. He has already obtained an estimate to relocate the septic system and is willing to do so. The plastic structure is a greenhouse enclosure (metal frame with plastic sides) surrounding the hot tub. Mr. Ryan further stated that the decking is approximately 55 inches in height and the pool 52 inches.

Attorney Gray questioned Mr. Ryan if the pool could be relocated. Mr. Ryan stated the only place it could be moved would be to the front of the property and there are a lot of trees in that area.

Attorney Gray called on the Board for any questions.

David Neal asked if the 12.5 x 4 ft deck off the back of the house was existing or something the homeowner added. Mr. Ryan stated the deck was existing and he added the stairs down to the hot tub. Mr. Neal also asked if the hot tub decking was the same level as the pool decking. Mr. Ryan confirmed that it is all one level.

Chairperson Wyder asked Mr. Ryan to confirm if the decking around the pool and hot tub were existing at time of purchase. Mr. Ryan stated they were not. He stated he designed

and built the deck himself, along with someone he hired. The pool was purchased earlier, but the decking was added later.

Mr. Ryan stated that the retrofit plans that were submitted are engineered plans to bring the deck up to code.

Andy Ward asked if the pool was used before the decking was built and if the house is a rental, to which Mr. Ryan confirmed it is not a rental and the pool was used prior to the building of the deck.

Chairperson Wyder stated according to the Dare County tax records, the property was purchased January 13, 2016. He asked Mr. Ryan if he ever saw a survey prior to purchase and did he use an attorney at closing. Mr. Ryan answered that he could not recall about the survey, but it may have been in the closing package. He also stated that an attorney was used for closing but the original structure encroaching on the rear setback was never mentioned.

Attorney Gray stated for purposes of the record he noted that the deed provided in the package shows Casey & Robbins Law Firm here in Nags Head.

Planning Board Attorney Wheless asked Mr. Ryan if the ground under his pool slopes from front to back. Mr. Ryan answered that it is just the opposite but for the most part it is pretty much even. He further stated that the grade under the hot tub may slightly slope back.

David Neal asked Mr. Ryan if he leveled the ground. Mr. Ryan replied that the only leveling of ground was done by hand with rakes.

Andy Ward asked if Ms. Shea's property was visible from the hot tub. Mr. Ryan replied that Ms. Shea's house is not visible through the trees.

Chairperson Wyder called on Town Attorney Gallop for questions.

Chairperson Gallop questioned Mr. Ryan why he couldn't move the hot tub and a section of back deck to the front of the property if he is willing to already move the septic system. Mr. Ryan stated that the front is all trees and they would have to be removed. Mr. Gallop also stated that since the pool is freestanding and not concrete, the decking around the pool could be adjusted as well. Mr. Ryan is already going to have to spend money to retrofit the deck and move the septic.

Mr. Ryan stated that someone had asked about flooding if the pool burst. He stated that he had a water main break which leaked 440,000 gallons of water and it was not even noticed. What water did leave the property went to Duck Rd.

Chairperson Wyder called on Attorney Malco for questions.

Attorney Malco stated to Mr. Ryan that the moving of the septic is a significant expense and it would seem easier just to move over some of the decking. Mr. Ryan said all of it is a big expense and that the entire back section, stairs, hot tub, and greenhouse would need to be moved.

Attorney Malco stated that without the hot tub Mr. Ryan could still use his house. Mr. Ryan replied yes.

Attorney Gray asked that the application and all attachments be introduced into evidence.

Attorney Gray called on witness, Ed Graham, who resides adjacent to Mr. Ryan on Lot #8, 289 Duck Rd. Mr. Graham stated that he wanted the Board to know he had no objections to Mr. Ryan's pool, hot tub and decking. He stated the entire project is well constructed and attractive. He claimed that if anyone was going to object, it would be the owners of lot #6. He did not see them here to complain and they are rarely in town. It would be a major undertaking to even try and move or take the deck apart. Mr. Ryan made a mistake by not getting a permit, but it is an inflatable hot tub and above ground pool.

Michael Basilone asked if the hot tub was inside the greenhouse. Mr. Graham replied yes.

Andy Ward asked if there was a handrail. Mr. Ryan replied that there is a fence around the decking that is about 36 inches in height.

PUBLIC COMMENT

Chairperson Wyder opened public comment for all those that have been sworn in and wish to give testimony.

Attorney Malco called on Ms. Shea (owner of Lot #29). He asked her if she knew when the deck was constructed and if it is viewable from her property. He also asked what is the impact on the value of her property and if she was ever consulted by Mr. Ryan or anyone else. Ms. Shea stated she can indeed see the hot tub from her dining room window and that the deck was built about a year ago. She further stated that Mr. Ryan had approached her in her back yard and had mentioned he was applying for a variance because he was not in code with the footage and if she had any objections. She stated she needed to speak with her husband. As far as property value, it is hard to say. When people are going to buy a house, they look at everything as a whole. She would hope that she would get the same value or more.

Chairperson Wyder closed the evidentiary portion of the hearing and moved to the argument portion.

ATTORNEYS SUMMARIES

Chairperson Wyder stated that the Board would hear the summaries from the lawyers.

Mr. Malco stated that NC State Statutes state that a variance is granted for unnecessary hardship or if conditions are peculiar to the property. This is not the case. Any hardships are from the applicant. He chose to build this hot tub, green house, and decking over the septic system, and will be required to move something. Mr. Ryan has built this structure with no permits or inspections. The zoning ordinance requires inspections, to insure safety. The standards for a variance have not been met.

Town Attorney Ben Gallop agreed with Attorney Malco in that the four standards have not been met. He stated that this is not an unnecessary hardship, but at best an economic hardship. There is no doubt that Mr. Ryan is a wonderful person but the standards for a variance have not been met. With respect to substantial justice and public safety, there are many regulations. The variance request is not specific. There are multiple corrections needed for the decking on the side and the rear. There are other ways to solve the problem.

Attorney Gray stated that the Board did hear evidence as to why this variance should be granted. Mr. Ryan is not denying he did not obtain a permit. Town Staff has been gracious in giving Mr. Ryan time to apply for this variance and it should be simple. He should keep what he has, where he has it. The lot is a heavily wooded area with big trees. The location where he put this is in fact the only location it could have been located without destroying the vegetation. The septic company believes they can move the septic tank and possible lines without removing the trees. Mr. Ryan is asking for a setback variance. The variance request is a result of the owner not obtaining the proper permits and violated the setbacks; not for the pool because a pool is an allowed use. So, neighbors would see the pool regardless.

Chairperson Wyder closed the evidentiary portion of the hearing.

DELIBERATION AND DECISION

The Board held a brief discussion.

Chairperson Wyder opened the floor for a vote/decision on the four standards that apply to variances. (*The concurring vote of four-fifths majority of the Board shall be necessary to grant a variance*)

- (1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
VOTE: 1 aye / 4 no (David Neal casted the sole aye vote)
- (2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
VOTE: 1 aye / 4 no (David Neal casted the sole aye vote)
- (3) Does the hardship result from actions taken by the applicant (or the property owner)? The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
VOTE: 5 aye / 0 no
- (4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
VOTE: 1 aye / 4 no (David Neal casted the sole aye vote)

Chairperson Wyder called on a vote for the variance. Andy Ward motioned to deny variance request VA-18-05. Michael Basilone seconded the motion.

VOTE: 4 aye / 1 no (David Neal casted the sole no vote)

Chairperson Wyder closed the public hearing on VA-18-05. He also indicated that further business would be conducted as the Planning Board (not acting as a Board of Adjustment).

VIII. PUBLIC COMMENT:

None

IX. PLANNING BOARD MEMBER COMMENTS:

Elizabeth Morey stated that the Town has every right to cut trees within the Town's right of way. In an effort to look better or more considerate, the Town could consider placing signage in an area where trees are to be removed that notifies residents in that area that trees will be removed, and that the residents can call Town Hall with any questions.

Chairperson Wyder thanked the Board for having faith in him and nominating him as Chairperson.

Andy Ward stated that he hopes that the Town Council will send both ZTA 18-03 and ZTA-18-07 back to the Planning Board for consideration. He expressed interest in the Board being more involved in the development of zoning text amendments.

X. ANNOUNCEMENTS:

Chairperson Wyder announced that the next scheduled Planning Board meeting is August 20, 2018.

XI. ADJOURNMENT:

Elizabeth Morey motioned to adjourn. Andy Ward seconded the motion. The motion passed unanimously and the meeting adjourned at 7:46 p.m.

ATTEST:

RESPECTFULLY SUBMITTED:

Glenn Wyder, Chairperson

Sheila Kane, Town Clerk

STAFF REPORT

To: Southern Shores Planning Board
Date: July 12, 2018
Case: VA-18-05
Prepared By: Wes Haskett, Town Planner/Code Enforcement Officer

GENERAL INFORMATION

Applicant: E. Crouse Gray, Jr.
3120 N. Croatan Hwy., Suite 101
Kill Devil Hills, NC 27948

Property Owner: Edward J. Ryan
291 Duck Rd.
Southern Shores, NC 27949

Requested Action: Variance from Section 36-202, (d), (4) and (5), Dimensional Requirements for the RS-1 Single-family Residential District

PIN #: 986810353335
Location: 291 Duck Rd.
Zoning: RS-1, Single-Family Residential District

Existing Land Use: “Residential”

Surrounding Land Use & Zoning:

North- Residential; RS-1, Single-Family Residential District
South- Residential; RS-1, Single-Family Residential District
East- Residential; RS-1, Single-Family Residential District
West- Residential; RS-1, Single-Family Residential District

Physical Characteristics: Developed

Applicable Regulations: Chapter 36, Zoning Ordinance: Article III, Interpretation and Definition of Terms; Article VII, Schedule of District Regulations, Article XII, Board of Adjustment.

ANALYSIS

The applicant is requesting a variance to allow a previously constructed deck, with a hot tub and swimming pool, that encroaches the applicable 15 ft. side yard and 25 ft. rear yard setback requirements to remain as is in its current location. The unauthorized deck was discovered when the Town Building Inspector conducted an HVAC inspection on the subject property. Following inspection of the file, Town Staff determined that no permits were obtained for the unauthorized deck and no inspections had been conducted.

Section 36-57 defines “Yard” (setback) as a required open space, other than a court, unoccupied and unobstructed by any structure or portion of a structure, from 30 inches above the ground level of the graded lot upward, provided, however, that fences, walls, poles, posts, ocean dune platforms, walks, accessible ramps, steps and other customary yard accessories, ornaments, and furniture may be permitted in any yard subject to height limitations and requirements limiting

obstruction of visibility or any other requirements of the Chapter. Based on this definition, the unauthorized deck constitutes a Zoning Violation which is in violation of Section 36-202, (d), (4) and (5) of the Town Zoning Ordinance.

Section 36-367 of the Town Zoning Ordinance establishes that the Planning Board, when performing the duties of the Town Board of Adjustment, shall vary any of the provisions of the Zoning Ordinance upon a showing of all of the following:

- (5) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
 - Strict application of the ordinance would result in removal of the deck or the encroaching portions of the deck. The property owner's loss would be the costs incurred from removal of the deck, or encroaching portions of the deck, and possibly the swimming pool and/or hot tub. The required abatement of a violation does not rise to an unnecessary hardship.
- (6) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
 - There is nothing peculiar about this property which gives rise to a hardship. It's location, size, shape and topology are similar to many lots within the Town.
- (7) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
 - The unauthorized deck was constructed without a Building Permit or Zoning Permit. If an application for the deck had been submitted, the permits would have been denied due to noncompliance with Section 36-202, (d), (4) and (5).
- (8) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
 - The intent of Section 36-202 which establishes the applicable side and rear setback requirements is to provide for the low-density development of single-family detached dwellings in an environment which preserves sand dunes, coastal forests, wetlands, and other unique natural features of the coastal area. The district is intended to promote stable, permanent neighborhoods characterized by low vehicular traffic flows, abundant open space, and low impact of development on the natural environment and adjacent land uses. Public safety and substantial justice cannot be served by allowing someone to maintain an uninspected, unpermitted, and unlawful deck with a hot tub and swimming pool. To do so would be contrary to the ordinances, laws, rules and regulations which were violated by the property owner, and would allow the property owner to disregard regulations that others must abide by.